SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 121

PAUL H. BARNES,

vs. *Petitioner,*

COMMONWEALTH OF PENNSYLVANIA ex Rel. EMMA K. BARNES.

PETITION FOR RECONSIDERATION OF DENIAL OF PETITION FOR CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

To the Honorable Chief Justice and Justices of the Supreme Court of the United States:

The Petition of Paul H. Barnes, by his Counsel, respectfully represents:

That, on June 26, 1943, your Petitioner, having, theretofore, on March 26, 1943, been denied his Petition for Appeal from the Superior Court to the Supreme Court of Pennsylvania, filed his Petition to your Honorable Court for a Writ of Certiorari to the Superior Court of Pennsylvania, and

on October 11, 1943, your Honorable Court denied your Petitioner's said Petition.

That, appreciative of the consideration heretofore received from your Honorable Court, and with the abiding and implicit faith, inherited by our citizens of Colonial and Revolutionary War ancestry, in the Constitution of our Country and its interpretations by your Honorable Court, both of which derive their inspiration from the free men who voluntarily bound themselves in the Cabin of the "Mayflower" on that 21st day of November, 1620, to institute a government of freedom, as Bancroft says: "on the basis of equal laws enacted by all the people for the general good," your Petitioner, because of the discriminatory denial to him, by the Courts of Pennsylvania, of this anciently guaranteed equal application of its laws, again humbly comes appealing to your Honorable Court for a reconsideration of his Petition for Certiorari to the Superior Court of Pennsylvania, citing Mr. Justice Coulter in *Brown* v. *Hummel,* 6 Pa. 87, 97:

> "When the humblest citizen comes in this Court with the Constitution of his Country in his hands, we dare not disregard the appeal."

And, Mr. Justice Walling in *Commonwealth of Pennsylvania* v. *O'Keefe,* 296 Pa. 169 (1929), (cited with approval by Mr. Justice Sutherland in *Powell* v. *Alabama,* 287 U. S. 45, 77 Law Edition 158):

> "It has been authoritatively stated that the right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion: 6 R. C. L. 443."

And, calling to your attention Question I and its sub-divisions (a) and (b) of his said Petition for Writ of Certiorari (page 2), to wit:

QUESTION I.

Denying your Petitioner Due Process of Law, by

(a) *Denial to him of the Equal Protection of the Laws,* by actually not applying to your Petitioner *the rule of law in Pennsylvania,* affirmed by Judge Stadtfeld in the recent case of *Martocello* v. *Martocello,* 142 Pa. Superior Ct. 40 (1942), *that the Courts must, in making such Order upon the husband, take into consideration the separate income or earnings of the wife,* and thus discriminating against your Petitioner.

This denial of the equal protection of the laws involves, in Pennsylvania and most of the other States of the United States, an entire lack of any rule or formula of calculation which indicates at all—much less with an exactness—how the Courts in Pennsylvania and such States take into consideration the wife's separate income or earnings in making an Order upon a husband for the wife's support, when living separated from her husband, as in the case at Bar, and, although your Petitioner in his Petition to said Superior Court of Pennsylvania for Re-Argument (which went as part of his Petition for Allowance of Appeal to the Supreme Court of Pennsylvania) quoted (Record 103, 104) *Decker* v. *Decker,* 279 Ill. 300, 116 N. E. 638, that:

> "The method of computing the award when both have income is to consider what the wife should be allowed from the aggregate amount of both incomes, subtract her separate income, and award her the balance."

And, *Flavell* v. *Flavell,* Chancery of New Jersey, 178 A. 69:

> "Where the parties while living together maintained themselves satisfactorily on $30. per week; wife's personal income amounted to $800. annually, and her husband since separation inherited $110,000. and had an annual income of $6,000., husband was ordered to con-

tribute $700. annually toward wife's separate maintenance, and, in addition to pay master's fees and wife's counsel fee.

"The Court must carefully limit order for separate maintenance to demands of necessity as discerned by complainant's condition and station in life and defendant's ability to pay, and an order for amount calculated to render separation attractive to complainant is unwarranted."

(Your Petitioner has less than One-Quarter of the Principal,—and that subject to thousands of dollars liability for unpaid real estate taxes,—and *gross income* of only about one-half that of the Defendant in the *Flavell* case; while Mrs. Barnes has considerably more annual income than Mrs. Flavell's $800., yet the Order your Petitioner appeals from is $780., annually, as against the $700. per annum Order made by the Chancellor in the *Flavell* case.)

And your Petitioner in his aforementioned Petition to said Superior Court for said Re-Argument, suggested a rule or formula of calculation to be used in such cases *so that the parties might know that the wife's separate income or earnings were really taken into consideration in making the ORDER upon the husband, and to what extent, yet, still, in Pennsylvania, as this case at Bar clearly shows,* the decision *may say* that *the Court has taken the wife's separate income or earnings into consideration in making the Order, but there is absolutely nothing to show that is really the case, and to what extent; or that the Court has not, as was done in the case at Bar:*

QUESTION I.

(b) *Abused its Judicial Discretion by taking into consideration, as facts, false assumptions as to the size or amount of the wife's separate income or earnings, which, in the case at Bar, would never have been known but for*

the statement by Judge Rhodes in his opinion of January 28, 1943, where he said:

> "The income which appellant's wife receives from her separate estate is now less than when the present order of $15 per week was entered."

and which your Petitioner, by reference to the wife's testimony at the time of making said Order in 1939, (Petitioner's Brief in Support of Petition for Writ of Certiorari, Appendix D, and argument therein, pages 19-23) showed was not correct, as the wife in 1939 was not allowed by her own Counsel to testify as to her income, other than in 1938 it had been $934.74,—more than for any year for several years prior thereto. *Yet that $934.74,* which she said she did not expect but "hoped" to get in 1939, *was less,* even if she did get it in 1939, *than the $1219.28, or,* if we allow her claimed non-recurring (foreclosure) item of $262.39, *the $956.89, which she admitted she had received in the period covered by your Petitioner's Exhibit A* (Record 6A), *September 1, 1940 to August 31, 1941,* and, *so, completely contradicts Judge Rhodes's said assumption in the aforesaid quotation.*

And, Thus, by This Abuse of Judicial Discretion, and the denial to him of the equal application to this case of the *Martocello* v. *Martocello* rule, your Petitioner was deprived of the Due Process of Law guaranteed to him under the second and third paragraphs of Article VI of the Constitution of the United States, as enforced by Section I of Article XIV of the Amendments thereto; and under Article 1, Sec. 1, Sec 9, and Sec. 11 of the Constitution of Pennsylvania.

And, further, as to Question 1 (b), aforesaid, Denial of Due Process of Law by Such Judicial Abuse of Discretion, it is a matter of National Public Interest that your Honorable Court should grant Petitioner a Hearing on his said

Petition for said Writ of Certiorari *and, at the time of the decision thereon, enunciate a rule or formula of calculation to be used in arriving at the amount of such ORDER upon a husband where a wife is living separated from him, so that there will be no room, thereafter, for such ABUSE OF DISCRETION TO CREEP IN,* and rob either the husband or wife of their just decision in the matter of such support and thus to deny to either of them the *due process of law* guaranteed to both of them under the Constitution of the United States.

That your Honorable Court has the authority to so define and declare such rule is shown by: Page 284, U. S. Code, Annotated, U. S. Constitution, Article III, Sec. 2, Clause 1:

> "The Judicial Power shall extend to all Cases in Law and Equity arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;" * * *

Note 68. "Jurisdiction of Courts of the United States as depending upon Legislation by Congress:" * * *

> "SMITH *v.* ALABAMA (Ala. 1888), 124 U. S. 478, 8 Sup. Ct. 564, 31 L. Ed. 508, citing WHEATON *v.* PETERS (Pa. 1834), 8 Pet. 591, 8 L. Ed. 1055, and saying: 'A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstances that the courts of the United States, in cases within their jurisdiction, where *they are called upon to administer the law of the state in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction and are required to ascertain and declare the law according to their own judgment.* This is illustrated by the case of New York Cent. R. Co. *v.* Lockwood (N. Y. 1873) 17 Wall (U. S.) 357, 21 L. Ed. 627, where the common law

prevailing in the state of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the state, *but the law as applied was none the less the law of that state.*"

WHEREFORE, your Petitioner prays your Honorable Court to grant unto him this reconsideration of his said Petition for Writ of Certiorari to the Superior Court of Pennsylvania, that you may hear Argument thereon, and, by your decision, give your Petitioner the relief requested, and lay down such a fair and equitable Rule for making an Order upon the husband in such cases that thousands of others may have the benefit of such definiteness in this rapidly expanding law of "DOMESTIC RELATIONS" that so vitally affects the homes and happiness of all our people.

And your Petitioner will ever pray, &c.

Respectfully Submitted,

CHARLES S. THOMPSON,
GEORGE W. CUPPS, JR.,
Counsel for Petitioner.

Certificate.

It is hereby certified, that the foregoing Petition for Reconsideration of Denial of Petition for Certiorari to the Superior Court of Pennsylvania is filed in good faith and not for purposes of delay; that Petitioner did not ask for Stay of Proceedings pending the disposition of this matter, and by his punctual payments is fully complying with the Order of the Courts below in this case.

CHARLES S. THOMPSON,
GEORGE W. CUPPS, JR.,
Counsel for Petitioner.